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SENGODAN MUTHU & ORS v. BLUE VALLEY PLANTATIONS BHD & ORS

HIGH COURT MALAYA, IPOH
ANSELM CHARLES FERNANDIS JC
[CIVIL SUIT NO: 22NCVC-136-2011]
13 JULY 2017

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COMPANY LAW: *Winding-up – Petition – Consent order – Monies paid into court – Minority shareholders' refusal to accept monies paid into court – Company wound up by another creditor – Application to set aside previous consent order – Subsequent consent order agreeing that monies paid into court to be held in trust by official receiver as liquidator of company and released forthwith to minority shareholders – Alleged delay by official receiver in releasing monies – Post-judgment interest – Whether company liable to pay – Whether official receiver as liquidator agent of company – Whether minority shareholders entitled to interest*

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The plaintiffs were once minority shareholders of the first defendant ('the company') who brought a petition under s. 181 the Companies Act 1965 ('CA 1965') against the company. A consent order was recorded in 1996 ('1996 consent order'). In consequence thereof, plots of land of the company were to be given to the plaintiffs and the plaintiffs were also to be paid monies in exchange for the surrender of their shares to the company. Although the lands were given, the monies were not. That being so, a winding-up petition was filed by the plaintiffs in the High Court in 2000 on the ground of the company's inability to pay its debts. On 27 April 2009, the company paid into court a sum of RM7,685,062.38 being the sum claimed in the s. 218 notice under the CA 1965 together with interest of 6% per annum up to the date of payment ('the said sum'). The plaintiffs however refused to accept the said sum as they alleged the shares had by then increased in value and continued with the winding-up petition. The company's application to strike out the petition was successful. However, the company was subsequently wound up by another creditor in a separate winding-up petition. The plaintiffs then commenced another action to set aside the 1996 consent order on the ground that the said order was null and void. There were also two other related suits, one filed by the plaintiffs and the other by the company. The three suits were heard together and another consent order was recorded on 15 November 2013 ('the 2013 consent order'). Under cl. (2) of the 2013 consent order, the sum of RM7,685,062.38 that was the monies that were paid into court, was to be held in trust, for the exclusive benefit of the plaintiffs and to be released forthwith to the plaintiffs by the official receiver ('OR') as the liquidator of the company. The total amount was released to the plaintiffs' solicitors on 28 November 2016. The plaintiffs claimed that there was a delay of three years and 12 days by the OR in releasing the said amount. The plaintiffs further contended that the company was liable to pay interest for the late payment of the said amount, reason being the liquidator was an agent of the company. In the circumstances, the

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plaintiffs, *vide* encl. 84 claimed for post-judgment interest on the said amount because of the alleged failure by the company (as principle to the liquidator) to pay what they claim to be a judgment debt in accordance with the 2013 consent order. The company strenuously opposed the plaintiffs' application on the grounds that: (i) the monies concerned were the monies they paid into the court in 2009 inclusive of interest and held under trust by the OR and therefore not a judgment debt; (ii) once the monies were paid into court, they were absolved from all liabilities including the payment of the interest sum; (iii) the liquidator was not their agent. The issues that arose for determination, *inter alia*, were (i) whether the OR who was also the liquidator, an agent of the company; and (ii) whether the plaintiffs were entitled to the interest derived from the said amount.

Held (dismissing encl. 84 with costs):

(1) By virtue of the 2013 consent order, the said amount was to be released by the liquidator to the plaintiffs 'forthwith'. As the said amount was not released 'forthwith' by the liquidator, the said amount was held by the liquidator as trustee until they were released to the plaintiffs' solicitors. The scope and duties of the liquidator would be under the Trustee Act 1949 which allows a trustee to deposit monies in interest bearing accounts. The proposition in *Knowles v. Scott* is not applicable when the sums concerned did not 'form part of the company's assets'. It would be reasonable to infer that the parties had intended that the said amount would be held in trust to prevent these monies from falling into the hands of creditors as well as to be outside the scope of the petition. This court therefore gave effect to the clear and unambiguous words of cl. (2) of the 2013 consent order. (paras 21 & 22)

(2) Just as it was important when construing a term of a contract to determine the intention of the parties, so too was the position in construing the terms of the 2013 consent order. The parties intended that the said amount was not to form part of the company's assets at the time of the 2013 consent order. The wordings of para. (2) of the 2013 consent order was lucid and there could not be any other meaning attributed to it. The plaintiffs could not now say that the said amount was not held in trust in its true and 'strict sense' for the benefit of the plaintiffs. (para 27)

(3) As the effect of the company's payment into court, the debt eliminated and the creditor status would have been extinguished upon the company. This would lead to the relationship of creditor and debtor to no longer subsist. That being so, the OR could not be said to be an agent of the company *vis-a-vis* the sums paid into court from the date of such payment into court. (para 32)

(4) It was apparent that, on the one hand, the plaintiffs complained that the said amount had not been released to them despite the five day notice to do so. Then, on the other hand, the plaintiffs persistently urged the

OR not to release the said sums until all the appeals and criminal investigations had been completed. The plaintiffs could not blow hot and cold. In this respect, there could be no blame on the OR in releasing the said amount only on 28 November 2016 and not earlier. They were merely following the request of the plaintiffs. The issuance of the five day notice was nothing more than an afterthought for an opportunity to present itself to terminate the 2013 consent order. (paras 42 & 48)

(5) The said amount did not constitute a judgment debt. The OR who is also the liquidator was not an agent of the company. Apart from those findings, the plaintiffs was not entitled to claim interest in any event on the said amount. The delay in the release of the said amount to the plaintiffs was due to the conduct of the plaintiffs themselves in commencing multiple actions against the company and at the same time requesting the OR not to release the said amount until all the proceedings had been finally determined. It would simply be unconscionable to award the plaintiffs interest in those circumstances. (para 49)

Case(s) referred to:

Affin Bank Bhd lwn. Blue Valley Plantation Bhd & Yang Lain; Pylon Range Sdn Bhd (Pencelah) [2016] 1 LNS 204 HC ***(refd)***

Australian Mid-Eastern Club Ltd v. Yassim (1989-1990) ACSR 403 ***(refd)***

Ayerst v. C & K (Construction) Ltd [1975] 1 All ER 162 ***(refd)***

Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC ***(refd)***

Ganapathy Chettiar v. Lum Kum Chum & Ors [1981] 1 LNS 59 FC ***(refd)***

Knowles v. Scott [1889] 1 Ch 717 ***(dist)***

Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd [2003] 4 CLJ 834 HC ***(refd)***

Leon York-0-Matic Ltd (1966) 3 All All ER 277 ***(refd)***

Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd [2011] 1 LNS 1769 CA ***(refd)***

Pulsford v. Devennish [1902] 2 Ch 625 ***(refd)***

Re Windsor Steam Coal Company [1928] 1 Ch 609 ***(refd)***

Sengodan Muthu & Ors v. Blue Valley Plantations Bhd & Ors [2014] 1 LNS 1417 HC ***(refd)***

T R Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd [2011] 1 LNS 1221 HC ***(refd)***

Rangit Singh Gurnam Singh v. Team Durable Sdn Bhd [2015] 1 LNS 1003 HC ***(refd)***

Yeap Leong Hin & Ors v. Herbert J Ho Jr & Ors [1991] 2 CLJ 1230; [1991] 4 CLJ (Rep) 278 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181
Rules of Court 2012, O. 42 r. 12
Trustee Act 1949, s. 15

For the plaintiffs - Anthony Mariadass; M/s Mariadass Lock & Ainuddin
For the defendants - V Manokaran & N Yogendra; M/s Netto & Yohendra

Reported by Sandra Gabriel

JUDGMENT

Anselm Charles Fernandis JC:

Introduction

[1] This is an application in encl. 84 by the plaintiffs for the payment of interest on the sum of RM7,685,062.38. This sum was to be released to the plaintiffs by virtue of a consent order in 2013 (the 2013 consent order). The time frame for which interest is claimed for is from 15 November 2013 (the date of the 2013 consent order) to 28 November 2016 (when the last payment was made into the plaintiffs' solicitors account by the official receiver ("OR"). The OR was the court appointed liquidator.

Background

[2] The plaintiffs were farmers of a tea plantation called Blue Valley Plantation and the first defendant ("D1") called Blue Valley Plantation Bhd ("the company") and five others who were directors of the company at the material time. The plaintiffs were once minority shareholders in the company. They had brought a s. 181 petition under the Companies Act 1965 against the company and some respondents in the Ipoh High Court.

[3] A consent order was recorded in 1996 ("1996 consent order"). The plots of land of the company of varying sizes depending on the proportion of their shareholding in the company were given to the plaintiffs. They were also to be paid monies in exchange for the surrender of their shares to the company. The plaintiffs have since taken possession of their respective lands and have derived income from cultivating these lands.

[4] Although the lands were given, the monies were not. That being so a winding-up petition was filed by the plaintiffs in the Ipoh High Court in 2000 on the ground of inability of the company to pay its debts. After years of negotiations, finally in 2009 the company paid into court the full sum claimed together with continuing interest of RM7,685,062.38 being the sum claimed in the s. 218 notice under the Companies Act 1965 together with interest of 6% per annum up to the date of payment.

[5] The plaintiffs however refused to accept the said sum as they alleged the shares had by then increased in value and continued with the winding-up petition. D1's application to strike out the petition was successful. The Federal Court held that it was unreasonable for the plaintiffs not to have accepted the sums that had been deposited into court pursuant to the 1996 consent order. The company was subsequently wound up by another creditor Affin Bank Bhd on 18 April 2012 in a separate winding-up petition.

[6] The plaintiffs then commenced another action to set aside the 1996 consent order on the ground that the said order was null and void. There were also two other related suits, one filed by the plaintiffs and the other by

A the company. The three suits were heard together and a consent order recorded on 15 November 2013 ("the 2013 consent order"). This, however, was not the end of the matter between the parties.

[7] Under cl. (2) of the 2013 consent order, the sum of RM7,685,062.38 that is the monies that were paid into court, was to be held in trust, for the B exclusive benefit of the plaintiffs. The monies were to be released forthwith to the plaintiffs by the OR as the liquidator of the company. The total amount was released to the plaintiffs' solicitors on 28 November 2016. It is noted there is an additional sum of RM819,966.05 which was paid to the OR pursuant to the proofs of debt filed by the first and 15th plaintiffs. The C interest for this sum is also included in the claim by the plaintiffs. The RM7,685,062.38 and RM819,966.05 is collectively known as "the said amount".

[8] The chronology of events will give a useful insight on the plaintiffs' claim in this round of legal battle between them. This chronology is based D to a certain extent on the common chronology of events submitted by both parties at the commencement of this application with certain additions made for completeness. For ease of reference the chronology of events is set out in the following manner:

E 1995 A s. 181 Companies Act petition was filed by minority shareholders of D1 company (the plaintiffs herein) against the D1 and its directors.

1996 A consent order (the 1996 consent order) was recorded, whereby the plaintiffs herein surrendered their shares in D1 for land and F money. The lands were given but D1 had problem paying the cash consideration to the plaintiffs.

2000 Section 218 Companies Act 1965 notice for the monies due under the first consent order was served on D1 and a winding-up petition was filed by the plaintiffs in the Ipoh High Court Petition No. 28-G 87-2000 on 1 November 2000 on the ground of inability of D1 to pay its debts.

2009 After years of negotiations, D1 deposited the full sum claimed together with continuing interest of RM7,685,062.38 being the sum claimed in the s. 218 notice under the Companies Act 1965 H together with interest of 6% per annum up to the date of payment into court. The plaintiffs herein, however, refused to accept the money. They were of the view they were entitled to be paid a larger sum in view of the appreciation of the value of their shares. D1 then filed an O. 18 r. 19 RHC 1980 application to strike out I the winding-up petition.

2011 D1 was successful in their application and the Federal Court struck out the plaintiffs' winding-up petition.

2012 D1 was subsequently wound up by another creditor Affin Bank Bhd on 18 April 2012 in a separate winding-up petition. The court appointed the OR as the liquidator.

2013 Another consent order (the 2013 consent order) was recorded between the plaintiffs and the defendants on 15 November 2013. Pursuant to the 2013 consent order, three pending suits were resolved namely:

(a) 22NCVC-136-2011 (application by the plaintiffs herein to set-aside the 1996 consent order)

(b) 22-325-2008 (the plaintiffs' suit for misfeasance against the directors of D1)

(c) 22NCVC-225-10-2011 (D1's suit for a declaration that the plaintiffs herein are no longer shareholders)

2014 The plaintiffs made an application claiming for more monies under cl. 7 of the 2013 consent order. (encl. 67)

The application was dismissed by the High Court and the decision of the High Court was upheld by the Court of Appeal.

2015 Pylon Range Sdn Bhd as a contributory made an application for a permanent stay of the winding-up under s. 243 Companies Act 1965. The plaintiffs herein made an application for leave from the winding up court to commence action against D1 to declare the 2013 consent order to be set aside.

2016 The plaintiffs' application to set aside the 2013 consent order was dismissed by the High Court and the Court of Appeal.

The plaintiffs made this present application (encl. 84) for more interest to be paid to them.

The plaintiffs made an application (AA-24NCVC-323-07-2016) to the High Court Ipoh citing the Director General of Insolvency ("DGI") as a defendant for the monies which were paid into court under the 2013 consent order be released to the plaintiffs' solicitors and to be placed in an interest-bearing account the final disposal of the Civil Appeals and/or any other claims. This application was allowed. D1 obtained a permanent stay of the winding-up petition and this was affirmed by the Court of Appeal. For completeness, the following had happened since:

(a) On 1 November 2016, the DGI as trustees had paid RM7,685,062.38 to the plaintiffs' solicitors.

(b) On 28 November 2016, the DGI as trustees paid RM819,966.05 to the applicants solicitors. These payments were pursuant to the plaintiffs' application in (AA-24NCVC-323-07-2016)

A **The Plaintiffs' Case**

[9] The plaintiffs claim that they are entitled to interest on the said sum paid into court on 27 April 2009. The 2013 consent order specifically stated that the said amount was to be held in trust "exclusively" for the benefit of the plaintiffs and to be released by the OR "forthwith". The plaintiffs claim
B that the said amount was only deposited on 28 November 2016 when the final amount of RM819,966.05 was released into the plaintiffs' solicitor's client account. Thus, they claimed that there was a delay of three years and 12 days by the OR in releasing the said amount. In their submissions, the plaintiffs stated that D1 was liable to pay interest for the late payment of the
C said amount, reason being the liquidator was an agent of D1.

[10] The plaintiffs are claiming post judgment interest on the said amount because of the alleged failure by D1 (as principle to the liquidator) to pay what they claim to be a judgment debt in accordance with the 2013 consent order. The plaintiffs relied on O. 42 r. 12 of the Rules of Court 2012.

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First Defendant's (D1's) Case

[11] D1 strenuously opposed the plaintiff's application. They stated that they were not liable to pay the said interest to the plaintiffs. The monies concerned were the monies they paid into court in 2009 inclusive of interest
E and held under trust by the OR and therefore not a judgement debt. Further they stated that once the monies were paid into court they were absolved from all liabilities including the payment of the interest sum. The said amount was also subject to the terms of the 2013 consent order.

[12] D1 further submitted that the liquidator was not their agent. This was
F because pursuant to the 2013 consent judgment, the said amount was in the OR's hands and he was to release the monies to the plaintiffs. His role was that of a trustee as the said sum was exclusively for the benefit of the plaintiffs.

[13] It was also submitted by the counsel for D1 that the OR should be
G made a party to the application as the 2013 consent order was specific that the said amount to be held in trust for the plaintiffs and it was the OR that was to release the said amount to the plaintiffs.

Issues To Be Considered

H **[14]** Based on the submissions both oral and written by both parties and also on the affidavit evidence adduced, I find that there are two issues which the court has to consider, namely:

(a) Is the OR, who was also the liquidator, an agent of D1?

I (b) Are the plaintiffs entitled to the interest derived from the said amount?

Before embarking into these issues, I reproduce here the whole of the 2013 consent judgment for ease of reference.

2013 Consent Order

This Matter after being called for hearing in the presence of Mr A Mariadass and Mr VS Viswananthan of counsel for the plaintiffs and Dato V Manokaran together with Mr N Yohendra of counsel for the defendants.

(1) It Is Ordered that the title deeds deposited by D1 into court shall forthwith be released to Messrs Mariadass Lock & Ainuddin, solicitors for the plaintiffs for transfer to the plaintiffs of their respective lots and this respect any of the defendants caveat on the titles shall be removed forthwith and also any of the plaintiffs' caveats on the company's land shall forthwith be removed.

(2) And It Is Ordered that **the monies paid into court by the company on 27 April 2009 be held in trust for the exclusive benefit of the plaintiffs** (including the monies payable to Sengodan a/l Muthu the first plaintiff paid to the official receiver) herein to the amounts of their entitlements under the consent order dated 18 October 1996 and **be released forthwith to the plaintiffs by the liquidator of the company in full settlement of all monies payable to the plaintiffs under the consent order of 18 October 1996**.

(3) And It Is Also Ordered that **the plaintiffs shall henceforth cease as creditors of the company** and shall withdraw their proofs of debts.

(4) And It Is Also Ordered that the plaintiffs have **ceased to be shareholders of the company as from 27 April 2009** and are **precluded from exercising their rights as shareholders** as from that date.

(5) And It Is Also Ordered that for the avoidance of doubt is hereby agreed that the plaintiffs' right as shareholders of the company before 27 April 2009 shall be as recognised under the law.

(6) And It Is Also Ordered that the liquidator shall forthwith apply for the necessary order for the rectification of the register of shareholders under the Companies Act 1965.

(7) And It Is Also Ordered that the plaintiffs be at liberty to apply to vary the consent order dated 18 October 1996 with respect to the plaintiff's rights, if any, to any increase in the value of the shares as at 27 April 2009 and that defendants be at liberty to raise all necessary defences in opposing such an application.

(8) And It Is Further Ordered that the plaintiffs hereby withdraw Civil Suit No. 22-325-2008 and defendants hereby withdraw Civil Suit No. 22NCVC-225-10-2011 and both suits are struck out with no order as to costs.

(9) And It Is Lastly Ordered that there be no order as to costs. (emphasis added)

A **Is The Liquidator The Agent Of D1?**

[15] During submissions, the plaintiff relied heavily on the case of *Knowles v. Scott* [1889] 1 CH 717 to forward their contention that the OR, as liquidator, was the agent of D1. It therefore follows that liability fell on D1 as principal for the late release of the said amount.

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[16] Apart from *Knowles v. Scott*, the plaintiffs had, among other authorities, relied on the following cases to advance their aforesaid contention: *Pulsford v. Devennish* [1902] 2 CH 625, *Re Windsor Steam Coal Company* [1928] 1 CH 609, *Leon York-0-Matic Ltd* (1966) 3 All All ER 277 and *Ayerst v. C & K (Construction) Ltd* [1975] 1 All ER 162.

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[17] The argument the plaintiffs was endeavoring to put forward was summed up by Romer J in the following paragraphs of his judgment in *Knowles v. Scott*;

> It is an action brought against the liquidator of a company which was being wound up to the Plaintiff, as a shareholder, his proportion of cash and shares **forming part of the company's assets**, this delay being attributed to the negligence of the liquidator'. (emphasis added)

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[18] As to the nature and scope of the trust held by the liquidator the learned judge said the following;

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> Such an action as this cannot be maintained against the liquidator, ... The ground on which it is based is, that at law the Defendant is a trustee for the Plaintiff of his proportion of the assets in the liquidator's hands, and that the liquidator is liable in his capacity of trustee for negligence.
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> "In my judgment the liquidator **is not a trustee in the strict sense**, with such a liability affecting his position as has been contended for by the Plaintiff. The consequences would be very serious if such a doctrine were to be upheld. If a liquidator were held to be a trustee for each creditor or contributory of the company, his liability would indeed be onerous, and would render the position of a liquidator one which few persons would care to occupy". (emphasis added)

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[19] The proposition in *Knowles v. Scott* had been followed by the following cases in Malaysia namely *T R Hamzah & Yeang Sdn Bhd v. City Centre Sdn Bhd* [2011] 1 LNS 1221, *Yeap Leong Hin & Ors v. Herbert J Ho Jr & Ors* [1991] 2 CLJ 1230; [1991] 4 CLJ (Rep) 278.

H **[20]** As a general proposition of law, I would agree with learned counsel for the plaintiffs that the liquidator is an agent of D1. The situation here however is not quite so simple and straight forward. There are two factors namely;

(a) the terms of the 2013 consent order and

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(b) the 2009 payment into court

that this court would have to take into consideration in deciding as to whether the liquidator is, in the circumstances of this case, an agent of D1. These two factors are significant in distinguishing this case from that of *Knowles v. Scott* and the other cases and authorities depended on by the plaintiffs.

The Terms of the 2013 Consent Order

[21] Firstly, by virtue of the 2013 consent order, the said amount was to be held in trust exclusively for the benefit of the plaintiffs. The said amount was to be released by the liquidator to the plaintiffs "forthwith". As the said amount was not released "forthwith" by the liquidator, the said amount was held by the liquidator as trustee until they were released to the plaintiffs' solicitors. The scope and duties of the liquidator would be under the Trustee Act 1949. I particularly refer to s. 15 of the Trustee Act which allows a trustee to deposit monies in interest bearing accounts. The 2013 consent order went on to state that the plaintiffs were no longer to be regarded as creditors or shareholders of D1 from the date of the payment into court. The said sums were to be in full settlement of all monies payable to the plaintiffs under the 1996 consent order.

[22] It is clear that the said amount was no longer the assets of D1 when the monies were held in trust for the "exclusive" benefit of the plaintiffs. This fact is the distinguishing factor between *Knowles v. Scott* and all the other cases quoted by learned counsel for the plaintiffs on this point. The common thread that ran through the cases was that the properties concerned were still part of the company's assets at all material times and had not been divested either legally or equitably to any party. Neither were any of the cases quoted concerned with a payment into court by the company the full sum of the debt such as in this instance. In this present case, it is noted that there was consensus by the parties in the form of the 2013 consent order pronouncing that the said sums were held in trust. This court has therefore to give effect to the clear and unambiguous words of cl. (2) of the 2013 consent order. This similar approach was taken in the case of *Pembinaan Perwira Harta Sdn Bhd v. Letrikon Jaya Bina Sdn Bhd* [2011] 1 LNS 1769 where the Court of Appeal stated:

> We entirely agree that courts must give effect to the plain meaning of words, where words are clear and unambiguous.

[23] It is this court's view that the proposition in *Knowles v. Scott* is not applicable when the sums concerned did not "form part of the company's assets". As can be seen from the chronology of events, D1 was under threat of being wound up at the time of the 2013 consent order. It would be reasonable to infer that the parties had intended that the said amount would be held in trust to prevent these monies from falling into the hands of

creditors as well as to be outside the scope of the petition. In this respect I can do no better than to refer to *Sengodan Muthu & Ors v. Blue Valley Plantations Bhd & Ors* [2014] 1 LNS 1417 where Lee Swee Seng J stated:

> There was thus the tangible benefit of being paid the full cash consideration of the Shares surrendered and **not having to share this sum with the pool of other creditors as it is trust money** and at any rate if the other creditors are objecting, they could file the necessary application. As it is, there are no applications filed by any creditors. As the winding up petition was struck out and there is no impediment to the sums paid into Court from being paid out to the Plaintiffs to whom the sums are due as the agreed cash consideration with interest up to the date of payment into Court. (emphasis added)

In the above case, the plaintiffs were attempting to obtain more monies by interpreting cl. (7) of the 2013 consent order to say that that they were entitled to the increase in the value of their shares in Blue Valley Plantations. Their application was dismissed.

[24] I am in agreement with D1's counsel that, in the circumstances of this case, the said amount was in the hands of the liquidator and he was "a trustee in the strict sense" and not as that envisioned in the case of *Knowles v. Scott*. The exclusivity of the trust and the release forthwith to the plaintiffs speaks against the liquidator not being "a trustee in the strict sense" until the said amount is released to the plaintiffs' solicitors.

[25] It is trite law that the consent judgment can be equated to a contract between the plaintiffs and D1 and therefore binding on the parties. As the Federal Court had stated in *Ganapathy Chettiar v. Lum Kum Chum & Ors* [1981] 1 LNS 59; [1981] 2 MLJ 145:

> an order by consent is evidence of a contract between the parties and is binding on all parties to the order all the more so, where there is not the slightest question of any mistake as to facts or law.

[26] This point was further exemplified in the case of *Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd* [2003] 4 CLJ 834; [2004] 5 MLJ where it was held:

> By recording the consent order, the court was merely giving due recognition (that was then mutually sought) and effect to a new agreement between the parties. (See *Green v. Rozen* [1955] 2 All ER 797.) I would thus hold, as untenable and wholly without basis in law, the applicants' implied concession that the court has jurisdiction to hear a winding up petition, but has no power to record a consent order on the same. This cannot be right as the High Court is a superior court of record and s. 221(1) does not, in my view, debar the court from recording such order. (See *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, *Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn Bhd* [1975] 1 MLJ 134 and *KI Muhideen v. KEP Mohd Abdul Kassim* [1959] MLJ 257.)

> Further, when the parties agreed on the terms and have it recorded as a consent order, they were in reality and for all intents and purposes entering into a contract or settlement which was valid and binding, as a consensual agreement between the parties. By having the terms of the compromise recorded as a consent order by the court, the agreement becomes a rule of court, that is, a super-added command.
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> It is noteworthy that there is a difference between a consent order or judgment and one to which the party against whom it is entered merely submits. Unlike the latter, the former - where the compromise has been embodied in a consent order or judgment - affords evidence of the contract upon which it is based and which has been made a rule of court. See *Re Shaw* [1918] P 47, CA. See also *Croft v. Croft* [1922] 38 TLR 648 and *Aspden (Inspector of Taxes) v. Hildesley* [1982] 1 WLR 264. Indeed, such order has been said to be buttressed by superadded command of a judge. See *Lievesley v. Gilmore* [1866] LR1 CP 570, *Worthington & Co v. Abbot* [1910] 1 Ch 588; *Brister v. Brister* [1970] 1 WLR 664 and *Jessel v. Jessel* [1979] 1 WLR 1148, CA. See also *Horizon Technologies International Ltd v. Lucky Wealth Consultants Ltd* [1992] 1 WLR 24 PC and *The Law and Practice of Compromise* by David Foskett (4th Ed - Sweet & Maxwell 1996) p. 238.

[27] Just as it is important when construing a term of a contract to determine the intention of the parties, so too is the position in construing the terms of the 2013 consent order. This court finds that the parties intended that the said amount is not to form part of D1's assets at the time of the 2013 consent order. This must have been the intention of counsel for the parties in the course of thrashing out the terms of the consent agreement. The wordings of para. (2) of the 2013 consent order is lucid and there cannot be any other meaning attributed to it. The plaintiffs cannot now say that the said amount was not held in trust in its true and "strict sense" for the benefit of the plaintiffs.

[28] Further to this, cl. (2) of the 2013 consent order cannot be read in isolation. Clauses (3) and (4) respectively speak of the plaintiffs ceasing to be shareholders as well as creditors respectively. This goes to support counsel for D1's contention that the 2013 consent order must be read as a whole to evince that the OR is not the agent of the D1. For the proposition that a contract must be read as a whole together with the other clauses, reference is made to *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11; [1995] 1 MLJ 513, where the Federal Court held:

> We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration. In *Chamber Colliery Co Ltd v. Twyerould* [1915] 1 Ch 268n at p. 272, Lord Watson said:

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

The only inference that can be drawn is that, read as a whole, the 2013 consent order severs the ties that bind the liquidator and the company and together with it the relationship of principal and agent.

[29] Apart from what had been discussed above, the parties had brought up the issue of whether the said sums constituted a judgment debt. I find that the said amount do not qualify as a judgment debt. The terms were agreed upon and recorded in the form of a consent order. There was no mention of any interest to be paid on the said amount in the 2013 consent order. This was in contrast to the 1996 consent order where payment of interest was expressly provided for. Further, the said sums were to be released to the plaintiffs "forthwith" signifying that interest was not intended by the parties to be accrued. Apart from that, the said amount was to be the regarded as "full settlement" of the monies due from D1 to the plaintiffs.

The 2009 Payment Into Court

[30] The second distinguishing factor is that in this case the said RM7,685,062.38 was paid into court in 2009. It is common ground that the said amount was paid into court to prevent D1 from being wound-up pursuant to a winding-up petition presented by the plaintiffs in 2000. This amount that was paid was inclusive of interest accrued pursuant to the 1996 consent order.

[31] The significance of the payment into court was succinctly summed up by Zaki Azmi CJ (as he then was) in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481; [2011] 5 MLJ 521 where the plaintiffs' petition to wind up D1 was struck off on the application of D1. The learned Chief Justice had this to say with regards to the sums that were paid into court;

> Counsel for the appellant, contended that since the appellant have paid RM7,685,062.38 into court in April 2009 and there was continued readiness to pay that was a sufficient answer to the claim for the debt. Both these arguments are supported and answered in *Nationwide v. Franklins* (2002) 20 ACLC 308 at p. 310 Barret J, in the Supreme Court of New South Wales said:
>
> > Principles concerning tender and payment are discussed there (*Australian Mid-Eastern Club Ltd v. Yassim*) and I regard the matter as relatively clear. The defendant tendered the sum of $14,190 to the plaintiff but the plaintiff refused the tender. That refusal, Meagher JA tells us in the *Australian Mid-Eastern Club* case, means that the debt was not eliminated, a conclusion which is not

> surprising. **But as Meagher JA later observed, tender is an answer to a debt claimed if there is a continued readiness to pay coupled with an actual payment into court**. As I read what his Honour said, the actions the defendant took and the other events which happened yesterday afternoon amount to what his Honour called an answer to a claim for the debt. On that basis **the plaintiff's creditor status should probably be regarded as gone**. (emphasis added.)

See also the case of *Team Perable Sdn Bhd v. Ranjit Singh AQ/L Gurnam Singh* [2015] MLJU 657.

[32] As the effect of the payment into court is that "the plaintiff's creditor status should probably be regarded as gone", namely the debt eliminated and the creditor status would have been extinguished upon D1's payment into court. This would lead to the relationship of creditor and debtor to no longer subsist. That being so the OR could not be said to be an agent of D1 *vis-a-vis* the sums paid into court from the date of such payment into court. I find that the parties acknowledged and intended this position is to be so. Their consensus is reflected in cl. (2) of the 2013 consent order where the payment into court merged and crystallised into the consent order.

[33] It is perhaps appropriate at this juncture to refer to the case of *Australian Mid-Eastern Club Ltd v. Yassim* (1989-1990) ACSR 403 to reiterate the point in question in the actual words of Meagher JA as stated below:

> If a valid tender be made, a refusal of that tender (whether for good or bad reason, or for no reason at all) does not eliminate the debt in question. The relationship between the creditor and debtor still subsists. The tender is no answer to a claim for the debt **unless (as did not happen here) there is a continued readiness to pay, coupled with an actual payment into court** (see *Halsbury's Laws of England*, Vol 9 (3rd Ed) Butterworths, para 289 p 169). (emphasis added).

[34] To conclude on this point, I find that on the facts of this case the liquidator could not be regarded as the agent of D1. That being so I agree with learned counsel for D1 that the liquidator should have been made a party to this action. The reason being that the liquidator as trustee could in such circumstances be liable for the delay in releasing the money by their own actions, if in fact there was a delay. This however is subject to further discussion on whether the plaintiffs are entitled to their claim for interest in the first place.

Are The Plaintiffs Entitled To The Interest Claimed?

[35] In the course of submissions, the issue as to the reason for the purported delay of the said sums being released by the liquidator to the plaintiffs pursuant to the 2013 consent order had come to the forefront. It is important to look into this issue to determine as to whether the parties

A conduct had in anyway impeded the release of the said sums to the plaintiffs. This in turn would determine their entitlement to the interest derived from the said amount.

[36] Counsel for D1 forcefully argued that neither D1 nor any of the other defendants are to be blamed for this delay. He asserts that as it was the B conduct of the plaintiffs themselves, with their multiple court actions that caused the so-called delay. Learned counsel for D1 further argued that it was never the intention of the plaintiffs to accept any release of the said amount pursuant to the 2013 consent order in the first place. He further asserts that the plaintiffs were anticipating that their appeals to set aside the 2013 consent C order would succeed and to obtain judgment for further sums from D1 due to the increase in value of the Blue Valley shares over the years. If the plaintiffs were to succeed in setting aside the 2013 consent order then the shares would have to be transferred back to the plaintiffs at an increased value.

D **[37]** In the course of arguments, learned counsel for D1 had brought to the court's attention a letter dated 18 March 2015. The letter was from the plaintiffs' solicitors namely Messers Mariadass Lock and Ainuddin and addressed to the "Pegawai Penerima bagi Blue Valley Plantations Bhd, Jabatan Insolvenci Malaysia". A copy of this letter was also sent to the E "Ketua Pengarah Insolvensi Malaysia". This letter was exhibited in the afidavit tambahan" of Summugam a/l Ramasamy, affirmed on 9 May 2017. Summugam a/l Ramasamy is the sixth defendant herein.

[38] To appreciate better the factual matrix of this case in the context of the delay the following relevant paragraphs in the said letter are reproduced F herewith:

> 2. **We have instructions from our clients not to accept the RM 7.6m ordered to be paid to our clients**. This is the second time that Blue Valley has defaulted to pay on time. The first time was when the time for payment on the 1996 Order expired on 13th March, 1998. G The next time was when on 4th July, 2014 we gave you 5 days notice to pay. We have given you enough time to pay. Kindly treat this letter as a termination of the contract with immediate effect as embodied in the consent order of 2013. **Take notice we will be filling appropriate proceedings to set aside the consent order for among other things, non compliance**.
>
> H
>
> 3. Further, as you know there is yet another Notice of Motion filed by a shareholder named Vasu to set aside this Order (a photo copy of this application is enclosed for your reference).
>
> 4. We are also now of the opinion that the Order is wrong and is contrary to s. 223 of the Companies Act.
>
> I
>
> 5. A disposal of assets of a company under winding up can be made only in a winding up court.

6. We would suggest that in legal matters, you only act in accordance with the instructions of your Department's legal advisors.

7. Until this Application and all other matters pending in court are finally disposed of and your investigations into all allegations of criminal and statutory offences committed by the directors of the Company have been completed and the sum of Rm 50 million siphoned off from the company has recovered we do not think **and would request you not to dispose of any assets of the company**.

8. Further if in spite of the offences committed by the directors of the Company you are of the opinion that no investigations under s 235 of the Companies Act is necessary and have filed your report in court and obtained the order from the winding up court to disburse the funds to the creditors, **we would request you not to disburse any of the company's assets or enter into any sale of any of the company's assets**.

9. In view of this kindly confirm that **you will not disburse any funds to any party including our clients** or enter into any transactions involving company assets unless you have the order of the winding up court for such disposal.

10. **We had in our Notice of Motion dated 18th February 2014 informed you of all the statutory and possibly criminal offences that have been committed by the director of the Company** and the investigations that you have to do under the law. For your reference we enclose herein the Motion that we filed and your reply to that Motion. (emphasis added)

[39] The letter is essentially divided into two parts. The first part conveyed the message that the plaintiffs were terminating the consent order of 2013. The reason being that they had till the date of the letter not received the said amount which were supposed to have been released to them "forthwith". The five days notice to pay given to the OR on 4 July 2014 was also not complied with. Conversely, the second part of the letter demands that the said amount is not to be released to anyone including the plaintiffs themselves. The plaintiffs wanted criminal investigations as well as pending court actions against D1 to be completed before the said sums were released to them.

[40] From the contents of the letter it could be discerned that the plaintiffs filed a notice of motion indicating to the OR of possible criminal offences against D1. The plaintiffs had called for criminal investigations to commence against the director of D1 as early as 18 February 2014, that is, soon after entering into the 2013 consent order on 15 November 2013. The letter reveals the plaintiffs' request that the said sums are not to be released until the investigations were completed.

[41] On perusing the said letter, this court is of the impression that the plaintiffs had no intention to receive the said amount from the liquidator even if the said amount was released to them. The plaintiffs had even requested the said amount not to be released when the OR had filed a report in court and had obtained the order from the winding up court to disburse the funds to the creditors. It could be reasonably inferred that the plaintiffs were adamant in pursuing their actions which were pending in the Court of Appeal rather than having the said sums released to them. The plaintiffs' actions, among them the attempt to set aside the 1996 consent order, the plaintiffs' suit for misfeasance against the directors of D1 regarding the sale of the plaintiffs shares and their application for leave from the winding up court to commence action against D1 to declare the 2013 consent order to be set aside are all indicative of this intention.

[42] It is apparent that on the one hand the plaintiffs complained that the said amount had not been released to them despite the five day notice to do so and terminates the 2013 consent order on that basis. Then on the other hand the plaintiffs persistently urged the OR not to release the said sums until all the appeals and criminal investigations had been completed. It is this court's view that the plaintiffs cannot blow hot and cold. In other words, they cannot approbate and reprobate. It is to be noted that even after the said letter, there were other court actions commenced by the plaintiffs such as the present case and the proceedings in encl. 67. At this point, I do not want to speculate whether other court actions may be forthcoming.

[43] The fact that the plaintiffs did not intend to accept the said amount and were waiting in anticipation of the Court of Appeal allowing their appeals including the setting aside of the 2013 consent order becomes more apparent upon reading the affidavit of Ramasamy a/l Panilipan, the 18th plaintiff herein. His affidavit was affirmed on 8 July 2016 in support of an application by the plaintiffs for the said amount which were held by the OR are released to the plaintiffs' solicitors. The director general of insolvency was made the defendant in the action (AA-24NCVC-323-07-2016). The said amount was to be placed in an interest-bearing account in a commercial bank pending the final disposal of the plaintiffs' appeals. It is significant that at the time of filing, no application was made for the said sums to be released to the plaintiffs. The reason for this is clearly stated in that portion of the affidavit of the said Ramasamy a/l Panilipan. This is what he said in his affidavit;

> 12. **There are various appeals pending in the Court of Appeal as well**. One of those Appeals relate to the Ipoh High Court's dismissal of our leave to file a writ to set aside the order made on 15th November 2013. We have also filed an Appeal against the permanent stay of the winding up which was ordered on 18 April 2016 (Appeal No. A-02(IM)(NCVC)-901-05/2016). There are two (2) other Appeals pending in the Court of Appeal. Two of the four (4) Appeals are fixed for hearing on 26.07.2016.

13. *If the Appeal to set aside the Consent Order is allowed, then these monies will have to be paid back to Blue Valley and Blue Valley will have to retransfer the shares to us and we become minority shareholders in Blue Valley*.

14. We do not know how long all these pending appeals are going to take. All these appeals and any further proceedings may well take 5 years. **If RM7,685,062.38 and the amounts of RM575,445.51 and RM244.520.54 are paid into court instead of a commercial bank these monies would not earn interest**. (emphasis added)

It is common ground that both the plaintiffs' appeal to set aside the 2013 consent judgment as well as the permanent stay of the winding up proceedings against D1 had been dismissed by the Court of Appeal.

[44] The facts show that ever since the monies were paid into court there was a persistent refusal by the plaintiffs to receive the monies that were paid into court. This seems to be so with regards also to the said amount which are to be paid to them by virtue of the 2013 consent orders. The plaintiffs has maintained this stance even though Zaki Azmi CJ had commented in clear and in no uncertain terms the following;

> In this appeal before us, the respondents in my view had acted unreasonably by refusing to accept the tender of payment and the appellant's continued readiness to pay. This was shown by the appellant depositing the amount RM7,685,062.38 into court" (the respondents there are the Plaintiffs in the present proceedings).

The learned Chief Justice went on to say further as to the reasons for the refusal of the plaintiffs to accept the monies that had been paid into court;

> The respondents' reason for refusing to accept the amount was, according to them, they feared that even if they accepted the amounts, these amounts were liable to be ordered to be paid back to the provisional liquidators as they may be construed as preferential payments under s. 264 of the Companies Act. The appellant replied that the real reason for them insisting that the appellant to be wound up was that they wanted the 65 acres of land rather than the monies. As a result of the delay in the appellant settling the amounts due with the respondents, respondents had wanted an additional 65 acres of land to be distributed amongst them *in lieu* of the cash payments. It was further claimed that the value of the 65 acres of land would be worth more than the amounts that were to be paid to the respondents. In short, the respondents were holding the appellant to "blackmail".

As to the conduct of the plaintiffs, the learned Chief Justice had this to say;

> In my opinion, the respondents before us had acted in **a vexatious manner and abused the process of the court by continuing to seek for the appellant to be wound** up even after the appellant had in good faith paid the money into court. (emphasis added)

Please see *Blue Valley Plantation Bhd v. Periasamy a/l Kuppannan & Ors supra*.

[45] The letter of 18 March 2015 had no doubt also influenced the OR in not releasing the said amount to the plaintiffs. This can be seen in the affidavit in reply of the official receiver and liquidator, Shahmin Amizah bt Abu Bakar affirmed on 28 July 2015. She was the Pengarah Insolvensi Negeri Cawagan Ipoh at the material time. This affidavit was filed to oppose an application by Pylon Range Sdn Bhd to acquire the lands of D1 which were charged to Affin Bank Bhd (28NCVC-97-12-2011). The 18 March 2015 letter was exhibited in her affidavit as "SAAB 11". While referring to the said letter she stated:

> Saya merujuk kepada perenggan 16 Afidavit Balasan Pemohon dan menyatakan bahawa adalah selamat bahawa **sebarang aktiviti pelupusan harta tidak dibuat** oleh Pegawai Penerima & Pelikuidasi sebagai tugas berhati-hati **semasa apa-apa penyiasatan dijalankan mengenai tingkah laku syarikat**. Saya menegaskan bahawa adalah tugas statutori bagi Pegawai Penerima dan Pelikuidasi menyiasat hal ehwal syarikat sekiranya terdapat aduan mengenai pentadbiran syarikat walaupun sebelum penggulungannya. *Saya sekali lagi juga menegaskan bahawa adalah penting untuk Pegawai Penerima mengekalkan keadaan dan pemilikan asal bagi harta-harta syarikat yang dalam penggulungan sebelum isu-isu yang berkenaan diselesaikan di Mahkamah.* (emphasis added)
>
> Sesalinan Surat **Tetuan Mariadaas Lock & Ainuddi bertarikh 18 Mac 2015** dilampirkan dan ditandakan sebagai Ekshibit "SAAB-11". (emphasis added).

[46] As for the five day notice dated 4 July 2014 sent by the plaintiffs to the OR, I am of the view that although the OR did not heed the notice to pay there was nothing to stop the plaintiffs from applying to court for an order that the said amount be paid into an interest bearing account of which they did so only in 2016 in AA-24NCVC-323-07-2016. Alternatively "as the winding up petition was struck out and there is no impediment to the sums paid into court from being paid out to the plaintiffs to whom the sums are due" they could have requested the said sums be paid to them directly. See *Sengodan Muthu & 23 Others v. Blue Valley Plantations Bhd (supra).*

[47] In this regard, I take note of the strong remarks made by Che Mohd Ruzima Ghazali J in deciding to dismiss the application of the plaintiffs in setting aside the 2013 consent order. The learned judge said that the issuance of the said notice seems to be an afterthought to take advantage of. I am in agreement with the learned judge in this respect. The following were his observations on this point;

> Sehubungan dengan itu, surat menuntut bayaran wang oleh SG (lihat eksibit "3" Lampiran 125) perlulah diteliti. Surat tersebut ditujukan secara terus kepada PP. Tempoh yang diberikan adalah singkat, hanya 5 hari bekerja. Kegagalan pihak PP membuat pembayaran tidaklah boleh dilihat sebagai kegagalan responden memenuhi kehendak PS 2013. Wang sebanyak RM7,685,062.38 sememangnya berada dalam pegangan PP. Pihak SG yang ada masalah dengan pihak PP yang telah dilantik oleh

mahkamah boleh secara terus membuat aduan di mahkamah untuk mendapatkan arahan sewajarnya. Ini hanyalah satu masalah pentadbiran yang boleh diselesaikan secara pentadbiran sahaja. **Namun begitu, pihak SG nampaknya cuba mengambil kesempatan dari kegagalan pihak PP tersebut bagi mencari alasan mengambil tindakan terhadap responden setelah beberapa usaha lain bagi mendapatkan faedah tambahan gagal**. (emphasis added).

See *Affin Bank Berhad lwn. Blue Valley Plantation Bhd & Yang Lain; Pylon Range Sdn Bhd (Pencelah)* [2016] MLJU 1547.

[48] In this respect there can be no blame on the OR in releasing the said amount only on 28 November 2016 and not earlier. They were merely following the request of the plaintiffs to the letter, so to speak. In my view, the issuance of the five day notice was nothing more than an afterthought for an opportunity to present itself to terminate the 2013 consent order.

Conclusion

[49] For the reasons stated above I find that the said amount do not constitute a judgment debt. I also find that the OR who is also the liquidator was not an agent of D1. Apart from those findings, the plaintiffs are not entitled to claim interest in any event on the said amount. The delay in the release of the said amount to the plaintiffs was due to the conduct of the plaintiffs themselves in commencing multiple actions against D1 and at the same time requesting the OR not to release the said amount until all the proceedings had been finally determined. It would simply be unconscionable to award the plaintiffs' interest in those circumstances. The plaintiffs' application in encl. 84 therefore is dismissed. I award costs of RM3,000 to the first defendant.